



March 24, 2017

Via first class mail and email

Administrator Scott Pruitt
Office of the Administrator
Environmental Protection Agency
William Jefferson Clinton Building
Mail Code 1101A
1200 Pennsylvania Ave NW,
Washington DC 20004

Re: Supplemental Request for Stay of EPA's Final Rule entitled Oil and Natural Gas Sector: Emission Standards for New, Modified, and Reconstructed Sources, 81 Fed. Reg. 35,824 (June 3, 2016) (Docket No. EPA-HQ-OAR-2010-0505)

Dear Administrator Pruitt,

GPA Midstream Association ("GPA Midstream") respectfully requests that the U.S. Environmental Protection Agency ("EPA") stay indefinitely the fugitive emissions requirements in EPA's Final Rule entitled Oil and Natural Gas Sector: Emission Standards for New, Modified, and Reconstructed Sources, 81 Fed. Reg. 35,824 (June 3, 2016) (the "Final Rule"). More specifically, GPA Midstream requests that all aspects of the Final Rule for compressor stations¹ and well sites² related to fugitive emissions standards, notifications, recordkeeping, and reporting be stayed pending administrative reconsideration and judicial review of the Final Rule. GPA Midstream has petitioned for administrative reconsideration and for judicial review of the Final Rule. While those petitions are pending before EPA and the courts, justice requires EPA to stay these requirements. A stay will ensure that GPA Midstream's members will not be forced to unnecessarily invest substantial resources to comply with fugitive emissions requirements that ultimately may be reversed or revised after reconsideration by the agency or through judicial review. Moreover, the new Administration has directed all agencies to consider ways to reduce unnecessary regulation,³ and EPA's new leadership is already reassessing a range of regulations

¹ See 60.5365a(j)

² See 60.5365a(i)

³ Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs (Jan. 30, 2017), *available at* <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling>; Presidential Executive Order on Enforcing the Regulatory Reform Agenda (Feb. 24, 2017), *available at* <https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda>.

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issued under the previous administration that substantially burden the energy sector.⁴ Justice requires the agency to pause the implementation of this burdensome monitoring requirement to allow that regulatory review to be completed, particularly in light of the GPA Midstream's pending petitions.

GPA Midstream has served the U.S. energy industry since 1921 as an incorporated non-profit trade association. GPA Midstream is composed of nearly 100 corporate members of all sizes that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as "midstream activities." Such processing includes the removal of impurities from the raw gas stream produced at the wellhead, as well as the extraction for sale of natural gas liquid products ("NGLs") such as ethane, propane, butane and natural gasoline. GPA Midstream members account for more than 90 percent of the NGLs produced in the United States from natural gas processing. GPA Midstream's members also operate hundreds of thousands of miles of domestic gas gathering lines and are involved with storing, transporting, and marketing natural gas and NGLs.

Introduction

GPA Midstream has a long history of working collaboratively with state and federal regulators to identify commonsense solutions on a wide range of regulatory issues—including many environmental issues. GPA Midstream hopes to continue that collaborative working relationship with EPA through this rulemaking and reconsideration process. As part of that collaborative relationship, GPA Midstream provided extensive comments on EPA's proposed rule (Attachments A and B) and has actively engaged with EPA since the Final Rule was issued. Specifically, GPA Midstream submitted to EPA an administrative petition for reconsideration and request for stay of the Final Rule (Attachment C) that identified several legal and technical flaws with the Final Rule that needed to be corrected and explained how GPA Midstream's members would be harmed if the Final Rule were not stayed during EPA's reconsideration process. In addition, GPA Midstream filed a petition for judicial review of the Final Rule. See *GPA Midstream Association v. EPA*, D.C. Cir. Case No. 16-1267 (consolidated under Case No. 16-1242). Because the June 3, 2017 deadline to comply with the Final Rule's fugitive emissions requirements at well sites and compressor stations is fast approaching, GPA Midstream is renewing its request that EPA stay the effective date of that portion of the Final Rule.

Standard for Staying the Effective Date of a Final Rule

⁴ Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule (Feb. 28, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>; Federal Appellants Motion to Continue Argument and Hold Case in Abeyance Pending Administrative Action; *State of Wyoming v. EPA*, 10th Cir. Case No. 16-8068 (Mar. 15, 2017) (stating Department of Interior's intent to rescind regulations related to hydraulic fracturing on public lands).

Both Section 705 of the Administrative Procedure Act (“APA”) and Section 307(d)(7)(B) of the Clean Air Act authorize EPA to stay the effective date of a final rule. Under the APA, “[w]hen any agency finds that justice so requires, it may postpone the effective date of the action taken by it, pending judicial review.” 5 U.S.C. § 705. EPA has applied this standard to Clean Air Act cases.⁵ The standard for an administrative stay is significantly different from the standard for a stay used by the courts because it does not require a demonstration of irreparable harm. This is clear from the text of the APA:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve the status or rights pending conclusion of the review proceedings.

Id. Thus, the APA deliberately contrasts what is required for an administrative stay—“justice so requires”—and a judicial stay—“conditions as may be required” and “irreparable harm.” Similarly, Section 307(d)(7)(B) of the Clean Air Act also authorizes an administrative stay pending reconsideration, but does not premise that stay on a finding of irreparable injury. 42 U.S.C. § 7607(d)(7)(B) (granting EPA authority to stay the effectiveness of a rule during reconsideration). Such differences must be given effect,⁶ so there is no irreparable harm requirement for an administrative stay. As described below, both standards are met here.

Justice Requires that EPA Stay the Effective Date of the Fugitive Emissions Requirements in the Final Rule

In comments on the proposed rule and in administrative petitions for reconsideration GPA Midstream and other interested parties identified significant legal failings and technical flaws with the Final Rule. Specifically, GPA Midstream and other parties have articulated why, as a matter of law, EPA lacks authority to issue the Final Rule in its entirety, including (1) EPA lacks authority to regulate methane emissions under the CAA because it failed to make an endangerment finding with respect to the oil and natural gas source category in order to establish standards of performance for methane emissions from those sources; (2) EPA unlawfully used—

⁵ See, e.g., *Reconsideration of the Prevention of Significant Deterioration and Nonattainment New Source Review: Aggregation*, 75 Fed. Reg. 27,643 (May 18, 2010); *Ohio: Approval and Promulgation of Implementation Plans*, 46 Fed. Reg. 8,581, 8,582 n.1 (Jan. 27, 1981).

⁶ “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation marks and citations omitted; alteration in original).

and relied on—the “White Paper” process in promulgating the Rule; and (3) EPA unlawfully expanded the scope of the oil and gas source category.

Further, beyond EPA’s authority to issue the Final Rule, the comments/petitions explain in detail legal and technical flaws related specifically to EPA’s fugitive emissions monitoring requirements. These issues, in particular require that EPA stay the effective date of the fugitive emissions requirements pending EPA reconsideration and/or judicial review. Specifically:

- EPA’s unlawfully broad definition of well sites requires fugitive emissions monitoring for co-located midstream assets. By defining “well site” too broadly, EPA has created a risk that midstream assets co-located at well pads may become subject to well site fugitive emissions program. Midstream operators are legally distinct from upstream producers and it is unlawful for EPA to define well site in a manner that incorporates unrelated midstream assets. Moreover, as GPA Midstream has explained in comments to EPA, it is not cost effective to conduct fugitive emissions monitoring for the limited number of midstream assets co-located at well site.
- EPA’s expansion of the triggering events for repairing leaking equipment Delay of Repair lists is unlawful, arbitrary, and capricious. In the Final Rule, EPA expanded the triggering events for delayed repair of leaking equipment to include unscheduled and emergency vent blowdowns and compressor station shutdowns. These requirements ignore the remote and unmanned nature of many compressor stations and create the risk of long-term shutdowns that will disrupt the flow of natural gas until personnel and equipment can be mobilized to the sites.
- EPA’s requirement to conduct quarterly monitoring at compressor stations and semi-annual monitoring at well sites is arbitrary and capricious because such frequency of monitoring is not cost effective. Data from facilities subject to fugitive emissions monitoring under state law, as well as facilities engaged in voluntary fugitive emissions monitoring have demonstrated that methane leaks are much less prevalent than EPA assumes, rendering the costs of such frequent monitoring unjustifiable in comparison to the benefits of the monitoring program.
- EPA’s failure to include a definition of compressor in the modification definition of a compressor station in 60.5365a(j) is arbitrary and capricious. By failing to define compressor in a manner that is limited to compressors that move natural gas through pipelines, the Final Rule could be interpreted to include other compressors located at compressor station sites, including vapor recovery units designed to reduce overall methane and VOC emissions at compressor station sites. This would create incentives that are contrary to the goals of the fugitive emissions monitoring program.
- EPA’s imposition of costly and unnecessary monitoring and recordkeeping requirements is arbitrary and capricious. Many of the recordkeeping and reporting requirements

included in the fugitive emissions monitoring program impose costly requirements on upstream producers and midstream operators that do little to ensure the accuracy of the fugitive emissions monitoring program or further the goal of reducing methane emissions.

- EPA's failure to provide effective relief against fugitive emissions requirements during inclement weather when monitoring is infeasible or unsafe is arbitrary and capricious. EPA's Final Rule includes a narrow exemption from quarterly fugitive emissions monitoring when average temperatures fall below zero degrees Fahrenheit. The temperature threshold is too low and fails to account for the many remote and unmanned compressor stations where inclement weather can prevent access, interfere with monitoring equipment, and compromise worker safety, even when average temperatures exceed zero degrees Fahrenheit.

A more detailed list of the legal and technical flaws with the Final Rule is included in the statements of issues submitted by GPA Midstream (Attachment D) and other petitioners seeking judicial review of the Final Rule,⁷ as well as in the petitions for reconsideration. *See, e.g.*, Attachment C. Justice requires that EPA stay the effective date of the fugitive emissions requirements until EPA and the courts have had a full opportunity to review the petitioners' arguments to determine whether they have merit.

Failure to stay the effective date of the fugitive emissions requirements for well sites and compressor stations will cause immediate and irreversible harm to GPA Midstream's members and other regulated entities. The Final Rule requires upstream producers and midstream operators to prepare fugitive emissions monitoring plans and conduct initial monitoring of all affected facilities by June 3, 2017. To meet this impending deadline, producers and operators must take immediate action to develop the necessary monitoring plans, acquire monitoring equipment or engage qualified fugitive emissions monitoring contractors, and conduct fugitive emissions monitoring at each affected facility. This process will take time and will require significant and immediate investment of limited resources to meet the June 3 deadline. Those substantial investments are costs that cannot be recovered from EPA or any other entity if EPA or the courts later determine that the regulations were unlawful, arbitrary, or capricious and should be withdrawn or vacated. Upstream producers and midstream operators are already generally incentivized to take all cost effective actions to reduce methane and VOC emissions. It is inconsistent with principles of justice and fairness to require them to make these substantial additional expenditures to comply with burdensome regulations that may later be overturned or withdrawn.

⁷ See *North Dakota v. EPA*, D.C. Cir. Case No. 16-1242 (and consolidated cases) Doc. Nos. 1631518, 1632642, 1633507, 1633996, 1634081, 1634119, 1634136, 1634342.

Finally, in light of the recent Executive Orders described above that direct federal agencies, including EPA, to evaluate opportunities to reduce unnecessary regulation, granting a stay of the effective date of the fugitive emissions requirements will give EPA an opportunity to consider the costs of those requirements in light of the minimal benefits that they will provide. Federal agencies have already announced plans to rescind several environmental actions that will unduly burden the oil and natural gas sector and, in light of the pending petitions for reconsideration and judicial review, EPA could conclude that the fugitive emissions programs at compressor stations and well sites should also be rescinded. In light of the ongoing uncertainty regarding EPA's regulation of GHG emissions under Section 111 of the Clean Air Act, granting an administrative stay will allow EPA to make a full and informed decision, consistent with these executive orders, without requiring GPA Midstream's members to comply with the regulations in the interim.

Thus, in order to avoid significant adverse impacts on GPA Midstream's members, justice requires that the effective date of the fugitive emissions requirements in the Final Rule be stayed. The standard under Section 705 of the APA is therefore met and EPA has the authority to stay the effective date of the fugitive emissions requirements pending judicial review. Moreover, the only condition on EPA's authority to grant a stay under Section 307 of the Clean Air Act is that EPA must have decided to reconsider the rule. As explained in GPA Midstream's petition for administrative reconsideration, the standard for reconsideration is met and it therefore follows that the standard for a stay under the Clean Air Act is also met.

A Stay is Also Warranted Under the Standard Applied by the Courts

While a stay is warranted under the standards established by both the APA and CAA, it would be justified even under the more stringent standard employed by the courts. Courts typically consider four factors in determining whether to grant a judicial stay: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009). These factors must be balanced against one another, such that "[a] stay may be granted with either a high probability of success and some injury, or vice versa." *Cuomo v. US Nuclear Reg. Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). All four factors are satisfied in this case.

First, as described above, GPA Midstream has made the necessary showing that it would likely succeed on the merits. It has identified legal, factual, and procedural flaws in EPA's rulemaking process and reconsideration is warranted on the merits. Moreover, GPA Midstream and other petitioners have identified material legal and factual flaws in the Final Rule in their petitions for review that would result in vacatur of the Final Rule, if EPA does not grant reconsideration.

Second, failure to grant a stay will irreparably harm GPA Midstream's members by forcing them to incur significant compliance costs to develop fugitive emissions monitoring plans, acquire monitoring equipment or contract for conducting fugitive emissions monitoring, and conduct fugitive emissions monitoring at each affected facility. These harms cannot be remedied by prospective action to revise the Final Rule after granting reconsideration or after judicial review because the necessary compliance costs will have already been incurred.

Third, there are no demonstrable offsetting harms to third parties or the public interest from the stay sought by GPA Midstream because GPA Midstream's members, along with other producers and midstream operators have strong incentives to minimize methane emissions when feasible to do so. Methane is a valuable product in the natural gas production and gathering sectors, and methane losses have a direct and detrimental impact to overall profits from the sector. As a result, GPA Midstream's members, along with others in the sector, have taken significant steps to voluntarily reduce methane emissions. These efforts have produced significant methane emission reductions, even without EPA regulations. Thus, temporarily staying the Final Rule while EPA completes the reconsideration process will have no discernible impact on methane emissions from the gas processing sector. The balance of harms and public interest, thus, favor granting a stay.

Conclusion

For the foregoing reasons, the GPA Midstream respectfully requests that EPA stay the effective date of the fugitive emission requirements for compressor stations and well sites in the Final Rule pending reconsideration and judicial review.

Respectfully submitted,

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